Supreme Court, U.S.
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No. 99-2080

IN THE

Supreme Court of the United States

GILLMAN KNITWEAR COMPANY, INC.,
Petitioner,

v.

SEGRETS, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent, through its counsel, makes the following disclosure:

> Respondent Segrets, Inc. is a subsidiary of Liz Claiborne, Inc. Liz Claiborne, Inc. owns more than 10% of Segrets' stock. Liz Claiborne, Inc. is a publicly traded company.

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ARGUMENT

I. REASONS FOR DENYING THE WRIT

Petitioner Gillman Knitwear Co., Inc. ("Gillman") was held liable for three separate incidents of copyright infringement and ordered to pay statutory damages to Respondent Segrets, Inc. ("Segrets") after partial summary judgment and a bench trial in the United States District Court for the District of Massachusetts. Shortly thereafter, this Court resolved a split between the circuit courts of appeal when it held in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) that, despite the implications of Section 504(c) of the Copyright Act (17 U.S.C. § 504(c)(1)), defendants in copyright actions have the Constitutional right to a jury trial regardless of whether statutory or actual damages are claimed. When the *Feltner* decision was issued, the time period for Gillman to appeal to the United States Court of Appeals for the First Circuit had not yet lapsed. Gillman took advantage of this unusual reprieve and appealed on the grounds that it had been denied its newfound right to a jury trial. The Court of Appeals upheld the District Court's determination that two of Gillman's sweater designs (the Christie I and II designs) infringed on Segrets' Blanket Stitch sweater design and remanded for a jury trial the District Court's determinations regarding (i) the third infringement claim involving two other sweaters, (ii) the willfulness of each instance of infringement, and (iii) the amount of statutory damages. Gillman now claims that the Court of Appeals misapplied the law as it was clarified in *Feltner* when it affirmed the District Court's determinations that a reasonable trier of fact would *inevitably* find that Gillman's Christie I and Christie II designs were "substantially similar" to Segrets' copyrighted Blanket Stitch design.

The Court of Appeals' decision in this case does not conflict with any decisions of this Court, the decisions of a court of appeals for any other circuit, or the decision of any

state court of last resort. Furthermore, it does not depart from the usual and long-accepted course of judicial proceedings with respect to the ability of district or appellate courts to determine liability by summary judgment or directed verdict. Thus, the Petition does not raise any issues identified in Supreme Court Rule 10 as worthy of this Court's consideration. Indeed, Rule 10 states that petitions such as the instant one, which are based on alleged misapplications of a properly stated rule of law or erroneous factual findings, are "rarely granted."

A. The Lower Courts Correctly Ruled As A Matter Of Law That There Was No Genuine Issue Of Material Fact Regarding The Substantial Similarity Of Gillman's Christie I And Segrets' Copyrighted Blanket Stitch Design

Gillman's assertion that it was improperly deprived of its right to a jury trial on the issue of the substantial similarity of Gillman's Christie I sweater to Segrets' Blanket Stitch design ignores one critical and well-established precept: the Seventh Amendment to the United States Constitution affords a litigant a right to a trial by jury only as to those material facts about which there is a genuine issue. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979), *citing Fidelity and Deposit Co. of Maryland v. United States*, 187 U.S. 315, 319-20 (1902). As one commentator has succinctly explained, "[summary judgment] does not deprive a party of a jury trial as preserved in the Constitution . . . this procedure merely sets up an orderly method whereby a judge may determine whether or not there is any issue to try." H. Barton Williams, *The Scope of Summary Judgment under the Federal Rules*, 5 Vand. L. Rev. 607, 610 (1952).

Consistent with this well-established precept, courts regularly award summary judgment when issues of fact are

either not genuine or material. *See, e.g., Davis v. United States Government*, 742 F.2d 171, 173 (5th Cir. 1984), *citing Port of Palm Beach District v. Goethals*, 104 F.2d 706, 709-10 (5th Cir. 1939) ("[the plaintiff's] Seventh Amendment right to a jury trial was not violated by the granting of summary judgment for there were no material facts in dispute [despite the parties' contentions]"); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950) ("The motion for summary judgment . . . has an important place in providing a prompt disposition of cases which have no possible merit and in preventing undue delays in the trial of actions to which there is no real defense").

The *Feltner* decision did not change the law regarding when an issue can be decided by summary judgment; rather, it simply affirmed that "the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages . . . ." *Feltner*, 523 U.S. at 355. Thus, in *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 152 F.3d 1171, 1172 (9th Cir. 1998), the Court of Appeals for the Ninth Circuit, following the mandate of *Feltner*, instructed the district court to conduct a jury trial to determine the amount of statutory damages to be awarded. The issue of liability was not revisited because copyright infringement already had been established on summary judgment. *Id.* at 1171. As the Court of Appeals for the Ninth Circuit explained:

> Although the Supreme Court ruled in [the defendant's] favor on the narrow issue of whether he was entitled to a jury trial on statutory damages, the Court left undisturbed the district court's finding [on summary judgment], affirmed by this court, that [the defendant] is liable to [the plaintiff] for . . . copyright infringment.

Id. at 1171-72. *See Phillips v. Kidsoft, L.L.C.*, 1999 U.S. Dist. LEXIS 16564, *18 (D. Md. 1999) ("Nothing in the *Feltner* opinion indicates that the normal summary judgment

procedures and standards do not apply in the copyright context."); *Bridge Publications, Inc. v. F.A.C.T.Net, Inc.*, 183 F.R.D. 254, 259 (D. Co. 1998) (deciding on summary judgment issues of validity and infringement of copyrights and leaving for the jury question of damages).

The Court of Appeals in this case similarly declined to remand for jury determination the issue of substantial similarity between Gillman's Christie I sweater and Segrets' Blanket Stitch design and affirmed the lower court's determination on summary judgment. *See Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 61 (1st Cir. 2000) ("Issues properly decided on summary judgment need not be remanded for the jury trial recognized by *Feltner*"). This is not surprising, given that Gillman *admitted* that (i) it purchased Segrets' Blanket Stitch vest and used it as a model from which to copy, and (ii) other than the colors used, the complex design of its Christie I is "virtually identical" to Segrets' design. *Id.* at 59, 62; *Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 42 F. Supp. 2d 58, 65, 67 (D. Mass. 1998) ("William Gillman, an officer of Gillman, testified at his deposition that, other than the color, the Christie I and the Blanket Stitch sweaters were virtually identical."). The District Court confirmed that "[w]ith the exception of color, the design of the Christie I sweater is exactly the same as the design of the Blanket Stitch sweater." [1] *Segrets, Inc.*, 42 F. Supp. 2d at 68. These facts did not simply justify a ruling by summary judgment, they mandated it.

Supreme Court Rule 10 states that a writ of certiorari will be granted only for "compelling reasons." Stripped to its

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[1] The law is well settled that mere changes in color, without more, are not sufficient to avoid a finding of substantial similarity. *See Segrets, Inc.* 207 F.3d at 62; *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1094 n.6 (2d Cir. 1977). See Misstatements of Law and Fact section, *infra*.

core, Gillman's Petition is nothing more than an objection to the lower courts' finding that no genuine issue of material fact existed with respect to the substantial similarity of Gillman's Christie I sweater to Segrets' copyrighted Blanket Stitch design. As shown above, that objection is frivolous and, regardless, raises no issue worthy of this Court's attention.

B. The Lower Courts Correctly Ruled That A Reasonable Finder Of Fact Would Inevitably Conclude That Gillman's Christie II And Segrets' Blanket Stitch Designs Are "Substantially Similar"

Gillman also mischaracterizes the Court of Appeals' independent affirmation of the District Court's holding after trial that a trier of fact would "inevitably" find that Gillman's Christie II and Segrets' Blanket Stitch designs are "substantially similar." According to Gillman, the "First Circuit incorrectly concluded that this critical decision could be taken from the jury based upon its own comparison of photos, rather than the actual fabrics at issue." Gillman claims that a directed verdict regarding "substantial similarity" was impossible because Judge Wolf,[2] in denying Segrets' motion for summary judgment as to the Christie II, found that "reasonable minds might differ on the issue of substantial similarity." Gillman's argument fails as a matter of law and, again, raises no issue worthy of the Supreme Court's attention.

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[2] Judge Wolf was the District Court Judge who ruled upon the parties' motions for summary judgment before turning the case over to Magistrate Judge Bowler for the bench trial.

1. *The Court of Appeals did not improperly invade the province of the jury.*

This Court has long held that a directed verdict is not inconsistent with the rights afforded by the Seventh Amendment. *Parklane*, 439 U.S. at 336, *citing Galloway v. United States*, 319 U.S. 372, 388-93 (1943). "The denial of a jury trial is harmless error if the evidence meets the standard for a directed verdict." *Segrets, Inc.* 207 F.3d at 64 (citations omitted); *McDonald v. Steward*, 132 F.3d 225, 230 (5th Cir. 1998), *reh'g. denied*, 132 F.3d 225 (5th Cir. 1998) ("even if a party is erroneously denied a jury trial, the error is harmless if the evidence could not have withstood a motion for a directed verdict at trial."); *Frost v. Agnos*, 152 F.3d 1124, 1131 (9th Cir. 1998) ("An erroneous decision to decline a demand for jury trial is 'harmless if no reasonable jury could have found for the losing party, and the trial court could have granted a directed verdict for the prevailing party.' ") (citation omitted); *United States v. 243.22 Acres of Land in Town of Babylon, Suffolk County, N.Y.*, 129 F.2d 678, 684 (2nd Cir. 1942), *cert. denied*, 317 U.S. 698 (1942) (same). *See* Fed.R.Civ.P. 61 (error is harmless unless "inconsistent with substantial justice").

Working within this framework, the Court of Appeals reviewed *de novo* the District Court's conclusion that the ordinary observer looking at the Christie II " 'would *inevitably* conclude that Gillman unlawfully appropriated the [Blanket Stitch] design' (emphasis added)" and held that "after comparing photographs of the two works ourselves and reviewing the record, we agree." *Segrets, Inc.*, 207 F.3d at 65. The test for "substantial similarity" is "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." *Concrete Mach., v. Classic Lawn Ornaments, Inc.* 843 F.2d 600, 607 (1st Cir.

1988). "[I]t is only when 'the points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of similarity are (within the context of plaintiff's work) of minimal importance either quantitatively or qualitatively, [that] no infringement results.' " *Segrets, Inc.*, 207 F.3d at 66 (quoting *Concrete Mach.*, 843 F.2d at 608 and 3 Nimmer on Copyright § 13.03[B], at 13-43 (1987)).

As noted above, Gillman has admitted that the Christie I is virtually identical to the Blanket Stitch design in every respect except color. The Court of Appeals observed that "[t]he Christie II differs from Christie I and the Blanket Stitch design in a few details which are evident only on very close examination. [Theresa] Chang, the Gillman employee who made the changes, said that the patterns in the Christie II design were 'majorly' identical to those in the Christie I." *Segrets, Inc.*, 207 F.3d at 65. Indeed, the complex jacquard patterns of the Christie II are the same as those in the Blanket Stitch. *Id.* at 79. Gillman made only "slight changes in the embroidery, the use of arrows as opposed to rectangles in one row and the placement and number of certain buttons." *Id.* at 78. (See photograph comparing the Christie I design and the Christie II design in Appendix A.) Given these undisputed facts, in addition to Gillman's admission that it used Segrets' Blanket Stitch design as a model to copy, any reasonable observer would have to conclude, as the District Court and Court of Appeals did, that the Christie II design was "appropriated" from Segrets' design and that the points of similarity far exceed the points of dissimilarity.

Gillman's criticism that the Court of Appeals' holding was based solely on a prediction of what Magistrate Judge Bowler would have done, "*if* presiding over a jury," is simply wrong. Both Magistrate Judge Bowler and the Court of Appeals independently and explicitly found that the ordinary observer, viewing the protectable expression in the Blanket Stitch design, would *inevitably* conclude that Gillman unlawfully

appropriated the protected design. *Segrets, Inc.*, 42 F. Supp. 2d at 78; *Segrets, Inc.*, 207 F.3d at 65. *Cf. Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 322 (1967), *reh'g. denied*, 386 U.S. 1027 (1967) (holding that appellate courts are not barred by Seventh Amendment from granting judgment *n.o.v.* and the statutory grant of appellate jurisdiction to courts of appeals is broad enough to include the power to direct entry of judgment). Thus, the directed verdict standard was properly applied, both by the District Court and the Court of Appeals.

Moreover, there is no threat that either court exceeded the boundaries of the directed verdict standard by weighing the credibility of witnesses or otherwise improperly weighing contradictory evidence. Such issues are irrelevant to the consideration of "substantial similarity," which in this case requires only a visual comparison of sweater designs and the application of the legal standard. *See Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2nd Cir. 1991) (citation omitted) ("considering substantial similarity between two items, we review the district court's findings *de novo*—not on the clearly erroneous standard—because what is required is only a visual comparison of the works, rather than credibility, which we are in as good a position to decide as was the district court"); *King v. Ames*, 179 F.3d 370, 376 (5th Cir. 1999) (same). The competing designs are the only "facts" necessary to make the judgment, and no one disputes that the Blanket Stitch and Christie I and II sweaters incorporated the designs at issue or that Gillman used Segrets' designs as models from which to copy. Gillman simply has no reasonable basis for its Petition.

2. *A directed verdict is permissible even if summary judgment was previously denied.*

Gillman claims that, with respect to the Christie II, the evidence did not meet the standard of a directed verdict, and the Court of Appeals incorrectly reached the opposite

conclusion. Its entire argument is based on the fact that, prior to the bench trial before Magistrate Judge Bowler, Judge Wolf had denied Segrets' motion for summary judgment regarding substantial similarity of the Christie II and Blanket Stitch designs. Courts, however, have long recognized that an initial denial of summary judgment "does not necessarily mean that a verdict as a matter of law after the trial would be unwarranted." *DeCarlo v. Fry*, 141 F.3d 56, 61 n.1 (2nd Cir. 1998); *Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000) ("Binding precedent in this Circuit, [ ], expressly permits consideration of a Rule 50 motion after the denial of summary judgment") (citations omitted). *Bakalis v. Golembeski*, 35 F.3d 318, 327 n.10 (7th Cir. 1994) ("denial of summary judgment does not preclude re-evaluation on a motion for judgment as a matter of law. . . .") (citations omitted); *Armco Steel Corp. v. Realty Investment Co., Inc.*, 273 F.2d 483, 484-485 (8th Cir. 1960) (" 'Even in cases where the judge is of the opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment' ") (citation omitted). As the Court of Appeals for the Fifth Circuit in *Gross v. Southern Railway Co.*, 446 F.2d 1057 (5th Cir. 1971) explained:

> The existence of a genuine controversy [in connection with a motion for summary judgment] does not foreclose a directed verdict if on the evidence as it is actually and finally adduced on a trial reasonable minds could not reach a contrary conclusion. We said that this holding is a recognition that at times the issues may be such that only after the agony of a full-blown trial may it authoritatively be determined that there was never really the decisive issue of fact at all. We concluded in *Robbins* that "Certainty, or predictable certainty, if not actually unobtainable, is often an illusion in the complex variables which pass through a courthouse door. The

> rules contemplate that a judge can take a first and a second and a third and a final look."

Id. at 1060 (internal citations omitted).

Gillman also fails to note several important facts in its Petition. First, Judge Wolf conceded at the summary judgment hearing that his colorblindness might limit his ability to compare the sweaters. Gillman itself made the argument before the Court of Appeals that Judge Wolf's "statement that he was partially color-blind demonstrates that he was unable to apply the substantial similarity test to the photographs of the sweaters submitted as part of the summary judgment papers." *Segrets, Inc.*, 207 F.3d at 61. Magistrate Judge Bowler, on the other hand, is not colorblind and had the actual sweaters before her for three days during trial.

Second, the evidence before Judge Bowler during the bench trial, and similarly before the Court of Appeals, differed from the evidence before Judge Wolf on summary judgment. For example, Judge Bowler had an opportunity to compare the actual sweaters at issue in this case for three days. *Segrets, Inc.*, 42 F. Supp. 2d at 80. As another example, Gillman's president William Gillman admitted at trial that Gillman pictured only the Christie I in its catalogues but filled customer orders for the Christie I with the Christie II. *Id.* at 67. "Few, if any of Gillman's customers complained to Gillman that they did not receive what they ordered. The slight modifications which Gillman made to the Christie I sweater therefore did not alter the overall look and feel of the sweater to the ordinary observer." *Id.*; *Segrets, Inc.*, 207 F.3d at 66. This same testimony was not before Judge Wolf. Accordingly, any suggestion that Judge Wolf's finding that "reasonable minds might differ" automatically precluded a directed verdict on the issue of "substantial similarity" is without merit.

3. *The fact that the Court of Appeals saw photographs rather than the actual sweaters is irrelevant.*

Despite the facts that (i) Gillman itself made no attempt to place in evidence the actual sweaters at issue either at the summary judgment hearing or at the argument before the Court of Appeals, and (ii) Gillman never objected to the entry of the photographs into evidence and entered its own photographs into evidence, it now suggests that the Court of Appeals' failure to view the actual sweaters somehow exacerbated the violation of Gillman's right to a jury trial: "The Court of Appeals substituted its evaluation of secondary evidence (photos) for that of a jury, which could have evaluated the actual fabric at issue. That aspect of the First Circuit's decision violated Gillman's Seventh Amendment right to a jury trial . . . ." Petition at p. 14.

Segrets' response to this argument is the same as that of the Court of Appeals:

> Determinations regarding the admissibility of photographs lie within the sound discretion of the district court. *See Lubanski v. Coleco Indus., Inc.*, 929 F.2d 42, 47-48 (1st Cir. 1991). We find no abuse of discretion. Photographs have been accepted and used in fabric design infringement cases. *See, e.g., Spectravest, Inc. v. Mervyn's, Inc.*, 673 F. Supp. 1486, 1489-90 (N.D. Cal. 1987). The color photographs show both the front and the back of the Blanket Stitch sweater in detail. Furthermore, the magistrate had the actual Blanket Stitch sweater before her during the three-day trial, although it was not made an exhibit. In fact, Gillman relied on photographs in its motion for partial summary judgment and could easily have introduced the Blanket Stitch sweater itself if it thought the sweater would be helpful to its claim of no substantial similarity.

Segrets, Inc., 207 F.3d at 65 n.8.

In short, Gillman has no legal or factual basis for its allegations that the Court of Appeals misapplied the law as set forth in *Feltner*. Even if that were not true, the issues Gillman has raised do not merit this Court's attention.

II. MISSTATEMENTS OF LAW AND FACT

Pursuant to Supreme Court Rule 15, Respondent sets forth Petitioner's misstatements of law and fact as follows:

Petition, pp. 3, 13. Petitioner claims that "[b]y submitting a color photo of its design, Segrets limited its claim to that colorway" and argues that the "Court of Appeals' ruling allows Segrets improperly to expand its copyright claim beyond the single colorway asserted in its copyright application." The copyrights Segrets obtained for its sweater designs pertain to the designs themselves and are not limited to the particular colors shown on the photograph submitted with its copyright application. The regulations of the Copyright Office do not limit the scope of the copyright to the colorway in which the design is submitted. 37 C.F.R. § 202.21(a) states that "In the case of pictorial or graphic works, such materials should reproduce the actual colors employed in the work." The regulations, however, say nothing about the relationship between the colors submitted with the design and the scope of the subsequent copyright. Gillman cites no authority at all to support its allegation.

Gillman also ignores the fact that courts have consistently held that mere changes in the color of a design, without more, are not sufficient to avoid a finding of substantial similarity. *See, e.g., Segrets, Inc.*, 207 F.3d at 62; *Novelty Textile Mills, Inc.*, 558 F.2d at 1094 n.6; and further cases cited below. These cases would make no sense if copyrights in designs were limited as Gillman suggests. Moreover, the Copyright Act, 17 U.S.C. § 106 gives copyright owners the exclusive right to make derivative works, which certainly include nearly identical complex designs in different colorways.

Even if Gillman's unsupported claim was right (which it is not), the Court of Appeals' failure to enforce such limitations on Segrets' copyright would constitute harmless error. *See Benham Jewelry Corp. v. Aron Basha Corp.*, 1997 U.S. Dist. LEXIS 15957 (S.D.N.Y. Oct. 14, 1997). In *Benham*, the counterclaim defendants alleged that not all of the counterclaim plaintiff's pendants were covered by the copyright at issue because the photograph submitted with the application to the Copyright Office included only some of the versions of the pendants *Id.* at *33. The court held that "errors contained in copyright registration, if committed without deceptive intent, are harmless and do not invalidate the copyright." *Id.* at *34.

Finally, it should be noted that Gillman made this argument regarding the "colorway" limitations of Segrets' copyright for the first time in its brief submitted to the Court of Appeals. Consideration of new theories on appeal should not take place except "in order to prevent a clear miscarriage of justice." *United States of America v. Sachs*, 679 F.2d 1015, 1019 (1st Cir. 1982), *citing Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d at 500.

Petition, p. 5. Gillman states that the Blanket Stitch vest was produced in only one color combination. Actually, Segrets sold another version of the Blanket Stitch vest with different colors the following season.

Petition, p. 5. Gillman states that "[m]any of the elements used in Segrets' Blanket Stitch vest had been used in other garments including "the use of jacquarding pattern" and "the whip stitching around the edges" thus implying that these two "elements" were somehow part of the design. "Jacquard" simply refers to a kind of loom or method by which a fabric is woven. The jacquard method of weaving is obviously not copyrightable. Nor is the "whip stitch" used to sew the edges of the sweater copyrightable. It is the actual pattern that is

woven, or the "design," that is copyrightable. *See Segrets, Inc.*, 42 F. Supp. 2d at 75.

Petition, p. 6. Gillman claims that it made "additional changes to the embroidery and the configuration of buttons on the Christie I design to create Gillman's Christie II vest, in an effort to further distinguish it from Segrets' Blanket Stitch design" This is a misleading statement. After it was caught trying to sell the Christie I sweater, which Gillman admitted was "virtually identical" to Segrets' Blanket Stitch design, Gillman made only one effort to change the Christie I to the Christie II design. There were no "additional changes" to "further distinguish" the Christie II's design. Indeed, as Gillman admitted at trial, the only changes made were done by a Gillman employee who was not a designer, Theresa Chang, one night when she took the sweater home with her. Ms. Chang was given the terse instruction by the president of Gillman, William Gillman, to change the sweater, without any further explanation. *Segrets, Inc.*, 42 F. Supp. 2d at 66.

Petition, p. 6. Gillman states that it "believed an ordinary consumer could readily distinguish its Christie II vest from Segrets' Blanket Stitch vest." As Magistrate Judge Bowler noted, "[a]ny alleged belief on the part of Gillman that its conduct was not infringing was not made in good faith and was not objectively reasonable." *Segrets, Inc.*, 42 F. Supp. 2d at 66.

> Gillman itself sold the Christie II sweater through a catalogue picturing the Christie I sweater. Nor did it advise customers of the discrepancy. Such conduct implies that Gillman viewed the Christie II sweater as substantially similar to the Christie I sweater, a sweater which Gillman knew was an exact copy of the Blanket Stitch design albeit with the exception of its color. Customers did not complain when Gillman shipped them the Christie II sweater in lieu of the pictured Christie I sweater thereby further evidencing to Gillman the substantial similarity of the two sweaters.

Id., at 66. *See Segrets, Inc.*, 207 F.3d at 59. Thus, Gillman had ample grounds to believe that consumers could *not* readily distinguish between the Blanket Stitch and the Christie II designs, but not otherwise.

Petition, p. 6. Gillman states that it only sold 7488 Christie II sweaters for a total sales [sic] of $116,127, at a loss (after including overhead) of $8,862. These figures were hotly contested at trial for many reasons, including inconsistencies in Gillman's evidence regarding how many sweaters were actually sold, the price at which they were sold, its methods of calculating overhead and improper deductions taken, including the $10,000 it claims it spent modifying the Christie I after it was caught by Segrets. *See, e.g., Segrets, Inc.*, 42 F. Supp. 2d at 71-72.

Petition, p. 7. Gillman claims that it never sold any of the Christie I sweaters. Segrets believes that some of the Christie I sweaters were sold due to inconsistencies in Gillman's deposition testimony and the documents produced by Gillman.

Petition, p. 10. As set forth above, Segrets disputes Gillman's contention that the *Feltner* decision was misapplied by the Court of Appeals.

Petition, p. 12. Gillman exaggerates that "[c]ourts long have recognized that color differences are important in deciding whether two items are "substantially similar." The truth is that, although courts have held that color is one factor among many that can be considered when determining substantial similarity, mere color changes cannot protect a defendant from liability for infringement. *See Concrete Machinery*, 843 F.2d at 610, *citing Novelty Textile Mills, Inc. v. Joan Fabrics Co.*, 558 F.2d 1090, 1094 n. 6 (2d Cir. 1977) (holding that "mere changes in the color scheme on the copied design would ordinarily not protect the defendant from a claim of infringement"); *Soptra Fabrics Corp. v. Stafford Knitting*

Mills, Inc., 490 F.2d 1092, 1094 (2d Cir. 1974) (specifically noting that the defendant was still liable for infringement despite the fact that it made the dress at issue in different colors than the original); *In Design v. Lauren Knitwear Corp.*, 782 F. Supp. 824, 831 (S.D.N.Y. 1991) (rejecting defendant's argument that different coloring of its sweater made it noninfringing); *Imperial Textile Co. v. Ametex Fabrics, Inc.*, 682 F. Supp. 18, 20 (S.D.N.Y. 1987) (holding that the defendant could not "avoid responsibility for further infringement because its reproductions of the design in other color combinations, viewed in a vacuum, are not so obviously similar").

Permitting a copier to avoid infringement of a complex design merely by changing its color(s) would completely undermine the Copyright Act's primary purpose of protecting artists' original expressions. Gillman suggests that the Court of Appeals for the Second Circuit has found color to be a major factor in *Knitwaves, Inc. v. Lollytogs*, 71 F.3d 996 (2nd Cir. 1996) and *Folio Impressions, Inc. v. Byer Calif.*, 937 F.2d 759 (2nd Cir. 1991). In *Knitwaves*, however, the court found that the two sweaters were substantially similar not just because their color scheme was similar, but mainly because the infringing design used the same fall symbols, and displayed them in "virtually the same manner" on "strikingly similar backgrounds." *Knitwaves*, 71 F.3d at 1004. Similarly, in *Folio Impressions*, the court noted in finding two fabrics not to be substantially similar that "[a]lthough the roses in both designs are placed against the background in a similar straight line pattern, the roses themselves are not substantially similar." *Folio Impressions*, 937 F.2d at 766. Color was only a minor factor in this case.

Petition, p. 15. Gillman states that the issue of "substantial similarity" is "indisputably a question of fact," not law. That is not true. Whether two designs are "substantial similar" has long been recognized be the courts as a "mixed question of

fact and law." *O'Neill v. Dell Publishing Co.*, 630 F.2d 685, 687 (1st Cir. 1980) (citation omitted); *North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1034 (9th Cir. 1992) (citations omitted). In addition, the determination of "substantial similarity," unlike other mixed questions of fact and law, does not implicate issues of credibility. *Folio Impressions*, 937 F.2d at 766. Rather, "what is required is only a visual comparison of the works." *Id.; King*, 179 F.3d at 376. Thus, the traditional duties of a jury—to judge the credibility of witnesses and weigh contradictory testimony and evidence—are not involved in deciding "substantial similarity." One need only apply the legal standard to the designs at issue and decide "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." *Concrete Mach.*, 843 F.2d at 607. It is only when "the points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of similarity are (within the context of plaintiff's work) of minimal importance either quantitatively or qualitatively, [that] no infringement results." *Id.* at 608, *citing* 3 Nimmer on Copyright § 13.03[B], at 13-43 (1987).

CONCLUSION

For all of the reasons stated above, Petitioner was not deprived of its Seventh Amendment right to a jury trial. The fact that the District Court and Court of Appeals decided certain issues under the summary judgment and directed verdict standards does not offend the Seventh Amendment. Nor does it raise important issues that this Court should expend its limited time to resolve. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

GILLMAN'S CHRISTIE II VEST

GILLMAN'S CHRISTIE I VEST